

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION

|                          |   |                           |
|--------------------------|---|---------------------------|
| MARK ANDY, INC.,         | ) |                           |
|                          | ) |                           |
| Plaintiff,               | ) |                           |
|                          | ) |                           |
| vs.                      | ) | Case No. 4:13 CV 2150 CDP |
|                          | ) |                           |
| HEAT TECHNOLOGIES, INC., | ) |                           |
|                          | ) |                           |
| Defendant.               | ) |                           |

**MEMORANDUM AND AMENDED CASE MANAGEMENT ORDER**

This matter is before me on the parties' joint motion to amend the case management order as it relates to summary judgment. The parties argue that "the variances in the terms and conditions contained in Defendant's Proposal and Plaintiff's Purchase Order . . . require a decision from the Court prior to trial regarding whose terms and conditions control the sale of the drying system." For this reason, the parties want an extended briefing schedule. I normally do not tell parties which issues to raise on summary judgment motions, although I note that the mere fact that this is a "battle of the forms" dispute under the UCC does not mean that either side is entitled to summary judgment. See ASi Industries GmbH v. MEMC Electronic Materials, Inc., 4:06CV951 CDP, 2008 WL 413819, at \*4-\*5 (E.D. Mo. Feb. 13, 2008) (factual disputes precluded summary judgment on "battle of the forms" dispute under the UCC). Therefore, just because the parties may find it convenient for the Court to resolve certain issues on summary judgment prior to trial doesn't mean that summary judgment will be granted. I will enter this schedule as requested, but the parties should understand that this in no way guarantees that any of these issues will actually be decided on summary judgment.

Moreover, as the parties have conceded that no other issues are appropriate for summary judgment, I find that the parties have waived their right to move for summary judgment on any issue not specifically set out below absent further Order of this Court. I still think this is a case that should be

settled, so I encourage the parties to revisit the issue of settlement to avoid the expense of possibly fruitless dispositive motions and trial. If the parties believe a further mediation session would be productive, they should file a joint motion for a stay of all deadlines for the purpose of continuing mediation.

Accordingly,

**IT IS HEREBY ORDERED** that the joint motion to amend the case management order relating to summary judgment briefing [#65] is granted, and the following amended summary judgment briefing schedule shall apply in this case and will be modified only upon a showing of exceptional circumstances:

No later than **February 2, 2015**, defendant shall file its motion for summary judgment setting out the facts, law and argument supporting its position as to which terms and conditions control the sale and purchase of the drying system, and which claims, if any, are subject to summary judgment based upon the application of those terms and conditions. By **February 20, 2015**, plaintiff shall file its response to defendant's motion for summary judgment/cross-motion for summary judgment, which shall set out the facts, law, and argument supporting its position regarding which terms and conditions control, and which claims, if any, are subject to summary judgment based on the application of those terms and conditions. Defendant shall file a reply brief in support of summary judgment and in opposition to plaintiff's motion no later than **February 27, 2015**, and plaintiff shall file a reply brief in support of its cross-motion for summary judgment and in response to defendant's motion for summary judgment no later than **March 6, 2015**. **The parties have waived their right to file summary judgment motions on any other issues absent further Order of this Court.**

**IT IS FURTHER ORDERED** that the consent motion for leave to file a second amended complaint [#66] is granted, and the second amended complaint is deemed filed as of this date.

**All deadlines not specifically amended above, including the Daubert motion deadline and the trial date, remain in full force and effect. Failure to comply with any part of this order may result in the imposition of sanctions.**

  
CATHERINE D. PERRY  
UNITED STATES DISTRICT JUDGE

Dated this 29<sup>th</sup> day of January, 2015.